Cornelius Jimbangan @ Mindolos v Joseph Crispin & Anor (Michael Persius Ubu, third party)

HIGH COURT (KOTA KINABALU) — SUIT NO K22–182 OF 2005
ABDUL RAHMAN SEBLI JC
21 MAY 2009

Civil Procedure — Striking out — Third party proceedings — Application to strike out defence and counterclaim — Whether counterclaim disclosed reasonable cause of action — Rules of the High Court 1980 O 18 r 19(1)

Tort — Defamation — Defences — Absolute privilege — Whether defendants' allegations in statement of claim protected by absolute privilege

The plaintiff in this suit instituted a writ of action against the defendants for unlawfully transferring his land into their names. By way of this action the plaintiff sought, inter alia, an order that he be reinstated as the registered owner of the land. The defendants admitted that they had never met the plaintiff in person and that all communications and dealings in connection with the purchase of the land were made through the third party, an advocate and solicitor. In their defence the defendants pleaded that at the request of the third party, they had granted the plaintiff a loan of RM15,000 with the land as security and that when the plaintiff failed to repay the loan the defendants bought over the land for RM38,000. However, only RM23,000 was paid, being the difference between the purchase price of RM38,000 and the loan amount of RM15,000. Subsequently the land was transferred to the defendants by way of a memorandum of transfer executed in the presence of the third party. Thus when the writ was served on the defendants they took out third party proceedings against the third party claiming for indemnity for any loss, in the event the plaintiff was successful in his suit against them. In these proceedings the defendants pleaded that the third party who was responsible for ensuring that the defendants had acquired good title to the land had failed or neglected to ensure that the defendants purchased the land free from encumbrances and had instead represented that the plaintiff was willing to sell the land for the total purchase price of RM38,000 of which the balance RM23,000 only was payable. They also pleaded that the third party had failed to attend to the proper execution and registration of the memorandum of transfer. For these and other alleged breaches of duty the defendants sought indemnity from the third party. The third party in turn filed his defence and counterclaim. However, the plaintiff's claim against the

defendants was dismissed on the grounds that it was time barred. In consequence the defendants' third party proceedings were also struck out as it was conceded by the defendants that their claim should be struck out in the event the plaintiff's claim was dismissed. Although the third party proceedings were struck out the third party proceeded with his counterclaim against the defendants for damages. It was the third party's case that the defendants' suit against him was malicious and defamatory and calculated to disparage him in his profession as an advocate and solicitor. Hence, the present application by the defendants, under O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC'), to strike out the third party's defence and counterclaim. It was the defendants' contention that the matters alleged by the third party to be defamatory were published on occasion of absolute privilege, and were therefore not actionable. The main issue in this application was whether the defendants' allegations as contained in the statement of claim were covered by absolute privilege.

Held, striking out the third party's counterclaim with costs:

(1) The defence of absolute privilege is recognised by the Malaysian courts. The allegations which the third party claims were defamatory and which were all contained in the defendants' statement of claim were necessary to protect the defendants' interest in the face of the suit brought against them by the plaintiff. As such, the statements even though defamatory were considered to be made in the course of legal proceedings and protected by absolute privilege. If the third party was right in submitting that the defendants' statement of claim was not protected by absolute privilege then it would mean that litigants who file court proceedings are exposing themselves to civil and even criminal action if the contents of the document are found to be defamatory (see paras 14–15 & 19).

(2) Under O 18 r 19 of the RHC a pleading should be struck out if it is shown to be 'obviously unsustainable'. The third party's counterclaim against the defendants in the present case disclosed no reasonable cause of action and was on the face of it obviously unsustainable (see paras 20 & 22).

[Bahasa Malaysia summary

Plaintif dalam guaman ini memulakan tindakan writ terhadap defendan-defendan kerana memindah milik tanahnya atas nama mereka dengan cara menyalahi undang-undang. Melalui tindakan ini plaintif memohon satu perintah bahawa dia dikembalikan sebagai pemilik berdaftar tanah tersebut. Defendan-defendan mengaku bahawa mereka belum pernah

bersemuka dengan plaintif dan bahawa segala komunikasi dan urus niaga berkenaan pembelian tanah dibuat melalui pihak ketiga, seorang peguam cara dan peguam bela. Dalam pembelaan mereka defendan memplid bahawa atas permintaan pihak ketiga, mereka memberikan plaintif pinjaman RM15,000 dengan tanah tersebut sebagai jaminan dan apabila plaintif gagal untuk membayar balik pinjaman tersebut maka defendan-defendan membeli tanah tersebut dengan harga RM38,000. Walau bagaimanapun, hanya RM23,000 yang dibayar, yang merupakan perbezaan antara harga belian RM38,000 dan jumlah pinjaman RM15,000. Kemudiannya tanah tersebut dipindahkan melalui memorandum pindah milik yang disempurnakan dalam kehadiran pihak ketiga. Oleh itu apabila writ disampaikan kepada defendan-defendan mereka memulakan prosiding pihak ketiga terhadap pihak ketiga menuntut untuk menanggung rugi bagi sebarang kerugian, sekiranya plaintif berjaya dalam guamannya terhadap mereka. Dalam prosiding ini defendan-defendan memplid bahawa pihak ketiga yang bertanggungjawab untuk memastikan bahawa defendan-defendan memperoleh hak milik kepada tanah tersebut telah gagal atau cuai untuk memastikan bahawa defendan-defendan membeli tanah yang bebas daripada bebanan-bebanan dan sebaliknya mewakili bahawa plaintif bersedia menjual tanah untuk jumlah harga belian RM38,000 yang mana hanya baki RM23,000 yang dibayar. Mereka juga memplid bahawa pihak ketiga gagal untuk memastikan perlaksanaan dan pendaftaran memorandum pindah milik. Defendan menuntut tanggung rugi daripada pihak ketiga untuk pelanggaran kewajipan seperti yang dinyatakan dan lain-lain. Pihak ketiga sebaliknya memfailkan pembelaannya dan tuntutan balas. Walau bagaimanapun, tuntutan plaintif terhadap defendan-defendan ditolak atas dasar dihalang oleh masa. Kemudiannya prosiding pihak ketiga defendan-defendan juga dibatalkan memandangkan defendan-defendan bersetuju yang tuntutan mereka akan dibatalkan sekiranya tuntutan plaintif ditolak. Walaupun prosiding pihak ketiga dibatalkan, pihak ketiga meneruskan tuntutan balasnya terhadap defendan-defendan untuk ganti rugi. Pihak ketiga menegaskan bahawa guaman defendan-defendan terhadapnya merupakan niat jahat dan fitnah dan akan memperkecilkannya dalam profesionnya sebagai peguam bela dan peguam cara. Maka, permohonan ini oleh defendan-defendan, di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), untuk membatalkan pembelaan pihak ketiga dan tuntutan balas. Defendan menghujah bahawa perkara-perkara yang dituduh oleh pihak ketiga sebagai fitnah diterbitkan atas dasar keistimewaan mutlak, dan oleh itu tidak boleh didakwa. Isu utama dalam permohonan ini ialah sama ada tuduhan-tuduhan defendan-defendan sepertimana yang terkandung dalam penyataan tuntutan dilindungi oleh keistimewaan mutlak.

Diputuskan, menolak tuntutan balas pihak ketiga dengan kos:

(1) Pembelaan keistimewaan mutlak diiktiraf oleh mahkamah Malaysia.

Tuduhan-tuduhan yang mana didakwa oleh pihak ketiga sebagai fitnah dan terkandung dalam pernyataan tuntutan defendan-defendan adalah penting untuk melindungi kepentingan defendan-defendan sekiranya guaman dimulakan terhadap mereka oleh plaintif. Oleh itu, pernyataan tersebut meskipun fitnah dianggap dibuat dalam aliran prosiding undang-undang dan dilindungi oleh keistimewaan mutlak. Sekiranya pihak ketiga adalah benar dalam mengemukakan bahawa pernyataan tuntutan defendan-defendan tidak dilindungi oleh keistimewaan mutlak maka ia bermaksud litigan yang memfailkan prosiding mahkamah terdedah kepada tindakan sivil dan jenayah sekiranya isi kandungan dokumen tersebut didapati fitnah (lihat perenggan 14–15 & 19).

(2) Di bawah A 18 k 19 KMT pliding seharusnya dibatalkan sekiranya ia menjadi 'obviously unsustainable'. Tuntutan balas pihak ketiga terhadap defendan-defendan dalam kes ini tidak mengemukakan sebarang kausa tindakan yang munasabah dan secara jelasnya tidak boleh dibenarkan (lihat perenggan 20 & 22).]

Notes

For a case on third party proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 6789.

For cases on defence for defamation, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 308–319.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 35, SC (refd)

Castro v Murray [1875] LR 10 Ex 213, CA (refd)

Dyson v AG [1911] 1 KB 410, CA (refd)

Joceline Tan Poh Choo & Ors v V Muthusamy [2003] 4 MLJ 494, CA (distd)

Kennedy v Hilliard (1859) 10 Ir CL Rep (NS) 195 (refd)

Lincoln v Daniels [1962] 1 QB 237, CA (folld)

Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson [1892] 1 QB 431, CA (refd)

Stern v Piper & Ors [1996] 3 All ER 385, CA (refd)

Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram [2000] 5 MLJ 465, HC (refd)

Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1, PCA (refd)

Young v Holloway [1895] P 87 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, 19(1)(a), (b), (d)

Michael Dennis Tan (Michael Dennis Tan & Co) for the defendants.
Munirah bt Ahmad Bashir Khan (Angela Ubu & Associates) for the third party.

Abdul Rahman Sebli JC:

[1] This is an application by the defendants to strike out the third party's counterclaim and defence under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('the Rules').

[2] The background facts leading to this application are as follows. In October 2005 the plaintiff sued the defendants for unlawfully transferring into their names his land under Native Title No 213022827. In the suit the plaintiff alleged that his signatures on the memorandum of transfer and the loan agreement were forged by the defendants. He pleaded that it was never his intention to sell the land to the defendants, who were total strangers to him. He therefore asked for an order that the title deed of the land be returned to him and that he be reinstated as the registered owner of the land.

[3] This allegation took the defendants by surprise because to their knowledge they had at the request of the third party, who is an advocate and solicitor, given a loan of RM15,000 to the plaintiff through the third party whereby the plaintiff agreed to repay a sum of RM15,640 within six months with the land as security. It was their pleaded case that the execution of the loan agreement was witnessed by the third party. When the plaintiff failed to repay the loan despite being given an extension of time, the defendants bought over the said land for RM38,000. However only RM23,000 was paid, being the difference between the purchase price of RM38,000 and the loan amount of RM15,000. By para 20 of the statement of claim it was pleaded that the RM23,000 was handed to the third party to be delivered to the plaintiff.

[4] The land was subsequently transferred to the defendants by way of a memorandum of transfer dated 2 November 1994 which was executed in the presence of the third party.

[5] The defendants admitted that they never met the plaintiff in person but pleaded that all communications and dealings in connection with the purchase of the land were made through the third party. By para 19 of the statement of claim it was pleaded that although the plaintiff was not present at the time they executed the memorandum of transfer they were told by the third party that the plaintiff had signed the memorandum of transfer in his presence.

[6] On the pleadings it is obvious that the defendants had left it to the third party to do what was necessary in order to vest in them good title to the land, free from all encumbrances.

A [7] Hence when the writ of summons and statement of claim were served on them by the plaintiff the defendants found it necessary to take out third party proceedings against the third party claiming to be indemnified for any loss in the event the plaintiff was successful in his suit against them. According to the defendants their action was purely to protect their interest B in the face of the suit brought against them by the plaintiff and not to defame the third party. The full particulars of the third party's alleged breaches of duty as pleaded by the defendants are as follows:

(a) Representing to the defendants that the plaintiff wanted a loan of C RM15,000 with the said land as security.

(b) Failing or neglecting to pay the loan amount of RM15,000 or any part thereof to the plaintiff.

(c) Failing to attend to the proper execution of the loan agreement.

D (d) Representing to the defendants that the plaintiff was willing to sell and transfer the land for the total purchase price of RM38,000 of which the balance of RM23,000 only was payable.

(e) Advising the defendants to purchase the land from the plaintiff.

E (f) Failing to advise the defendants not to purchase the land and failing to advise the defendants not to proceed with the transfer of the said land to the defendants.

(g) Failing to attend to the proper execution of the memorandum of F transfer.

(h) Representing that the plaintiff had executed the memorandum of transfer and duly witnessing what purported to be the plaintiff's signature on the memorandum of transfer.

G (i) Failing to pay the balance of the purchase price of RM23,000 or any part thereof to the plaintiff.

(j) Attending to registration of the memorandum of transfer when the documentation was not in order.

H (k) Failing to inform the defendants that the plaintiff had not executed the memorandum of transfer or that the documentation was not in order.

(l) Failing to ensure that the defendants purchased the land free from all encumbrances.

I (m) Failing to ensure that there was no omission, forgery, fraud or wrongdoing committed in the execution and registration of the memorandum of transfer.

[8] As it turned out the plaintiff's claim against the defendants was dismissed by Justice Ian Chin on 25 January 2007 on the ground that his action was time barred. In consequence the defendants' third party proceeding against the third party was also struck out as it was conceded by the defendants that their claim should be struck out in the event the plaintiff's claim was dismissed. The plaintiff was ordered to bear the costs of both proceedings.

[9] Despite the striking out of the third party proceedings the third party decided to pursue his counterclaim against the defendants for damages. His pleaded case is that the defendants' allegations in their statement of claim in the third party proceedings were baseless and that the suit was malicious and defamatory and calculated to disparage him in his profession as an advocate and solicitor. The third party claimed that the matters alleged by the defendants in their natural and ordinary meaning were understood to mean that he was unethical, untrustworthy, incompetent, reckless, negligent, and a criminal in that he had forged the signatures of the plaintiff and misappropriated the monies entrusted to him for his own benefit.

[10] The defendants on the other hand contended that the matters alleged by the third party to be defamatory were published on an occasion of absolute privilege and therefore not actionable in a court of law.

[11] The question is whether the defendants' allegations in the statement of claim are covered by absolute privilege. If so the third party has no cause of action against the defendants no matter how defamatory the allegations are. In *Royal Aquarium & Summer & Winter Garden Society v Parkinson* [1892] 1 QB 431 Lopes LJ said at p 451:

> The authorities established beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words were written or spoken maliciously, without any justification or excuse, and from personal ill will or anger against the party defamed.

[12] The rationale for this protection is explained by Pigott CB in *Kennedy v Hilliard* (1859) 10 Ir CL Rep (NS) 195 as being 'founded on public policy, which requires that a judge in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or prosecution for libel'.

[13] The rule of absolute privilege falls into three categories: see *Lincoln v Daniels* [1962] 1 QB 237 where Devlin LJ said at pp 257–258:

> This (the first) category covers all matters which are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson v M Ewan* [1905] AC 480 in which the House of Lords held that the privilege attaching to evidence which a witness give coram judice extended to the precognition of proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v White* (1914) 30 LTR 59 the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.

[14] The defence of absolute privilege is recognised by the Malaysian courts as can be seen in *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [2000] 5 MLJ 465 where James Foong J (as he then was) held:

> The submissions of defendant, however defamatory they were of the plaintiff, are protected by absolute privilege. The court accepted the submission when tendered. When this happened, the statements contained in these documents must be considered to be made in the course of legal proceedings.

[15] The allegations which the third party claims to be defamatory are all contained in the defendants' statement of claim. They were necessary to protect the defendants' interest in the face of the suit brought against them by the plaintiff. As such they fall squarely within the second category of absolute privilege mentioned by Devlin LJ in *Lincoln* and are therefore insulated from defamation action.

[16] Learned counsel for the third party cited the case of *Joceline Tan Poh Choo & Ors v V Muthusamy* [2003] 4 MLJ 494 for the proposition that the defendants' statement of claim is not protected by privilege as it had not been read out in open court. With due respect learned counsel has misconstrued and misapplied *Joceline Tan Poh Choo*. That case concerns the publication in the newspaper of part of the amended statement of claim which had not been read out in open court. It was for that reason that the court held that the appellant was not entitled to rely on the statutory defence of absolute privilege, not because the amended statement of claim had not been read out in open court.

[17] The point in contention in that case was whether the newspaper report should only be confined to what was publicly heard in open court and not to matters contained in documents filed in court, and not read in open court. The case of *Stern v Piper & Ors* [1996] 3 All ER 385 was cited with approval where Hirst LJ said at pp 394–395:

> However, I think it is significant that privilege only protects reports of proceedings taking place in open court, and that its foundation is that those proceedings took place in public so that the public in general should have access to fair and accurate reports thereof (see *Webb v Times Publishing Co Ltd* [1960] 2 All ER 789; [1960] 2 QB 535). This is a consideration of public policy, and does not extend to court documents which have not been brought into the public arena.

[18] In the present case the question of publication of the defendants' allegations in the newspaper does not arise at all. *Joceline Tan Poh Choo* is therefore irrelevant as the facts are distinguishable.

[19] If counsel is right in her submission it would mean that litigants who file court papers for purposes of court proceedings are exposing themselves to civil and even criminal action if the contents of the documents are found to be defamatory. That of course will be contrary to the principle expounded by Lopes LJ in *Royal Aquarium* and cannot be a correct proposition of law.

[20] The law on O 18 r 19 of the Rules is settled. A pleading should only be struck out if it is shown that it is on the face of it 'obviously unsustainable': see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 35. In *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 Lord Diplock cautioned that the power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power and should be exercised with the utmost caution. The court will not permit a plaintiff to be ousted from the judgment seat, so to speak, except where the cause of action is obviously bad and almost 'incontestably bad': see *Dyson v AG* [1911] 1 KB 410.

[21] If the pleading is so obviously frivolous that to advance it forward must be an abuse of the court process the claim will be struck out: see *Young v Holloway* [1895] P 87. The court will always guard its machinery from being used as a means of vexation and oppression in the process of litigation: see *Castro v Murray* (1875) LR 10 Ex 213.

[22] In my view the third party's counterclaim against the defendants discloses no reasonable cause of action, is scandalous, frivolous or vexatious

and is an abuse of the court process. The counterclaim (and the defence) is on the face of it obviously unsustainable and ought to be struck out with costs.

Third party's counterclaim struck out with costs.

Reported by Kohila Nesan